MBF FINANCE BHD.

v.

SRI-HARTAMAS DVPT. SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMPANIES WINDING-UP NO. D4-28-28-89]
19 OCTOBER 1991

COMPANY LAW: *Winding up - Statutory notice of demand - Whether issued in accordance with the Act - Whether issued by lawfully authorized agent - Test of insolvency - Statutory presumption of insolvency - Application to stay the winding-up - Locus standi - Inherent jurisdiction of the Court - Companies Act 1965, ss. 218(2)(a) & 243(1).*

CIVIL PROCEDURE*: Whether oral evidence can be adduced at the hearing of the petition for winding-up - Discretion of Court to grant or refuse adjournment - Whether mistake of a solicitor constitutes a valid ground for adjournment - Locus standi to make application for stay of winding-up - Inherent jurisdiction of the Court - Rules of the High Court 1980, O. 92 r. 4.*

The petitioner sought an order to wind up the respondent on the ground that the latter was insolvent. The petitioner had obtained final judgment against the respondent on 12 July 1988 for the judgment sum of more than RM5 million and on 27 December 1988 the petitioner had delivered a statutory notice to the respondent under s. 218 of the Companies Act 1965 (the Act). The prescribed period had lapsed and the respondent had failed to pay the sum demanded. The petition is supported by 27 other creditors.

The respondent resisted the petition on three grounds:

(a) that the presumption of insolvency did not arise in this case since the statutory demand was not issued in accordance with s. 218(2)(a) of the Act;

(b) that the statutory demand was not issued by the lawfully authorised agent of the petitioner and

(c) that the respondent was not insolvent.

At the continued hearing, the respondent abandoned the first and second grounds, and concentrated only on the third ground. The respondent contended that it was not insolvent as it has plenty of assets (although much of these was "locked-up" in pieces of land). The respondent also asked the Court to invoke its inherent jurisdiction to stay the winding-up.

Held:

[1] The notice of demand was properly issued and was in strict compliance with s. 218(2)(a) of the Act. The prescribed period of 21 days had lapsed since the notice was served, and as the sum demanded had not been paid, the respondent was deemed to be insolvent.

[2] The onus is on the respondent to show that it was able to pay its debts. On the evidence, the respondent had failed to show that it was not insolvent. It is useless for the respondent to say that if its assets are realised, there will be enough money to pay off its debts. A company, such as the respondents, may have wealth locked up in investments not presently realisable; although this may be so, yet if it does not have assets available to meet its current liabilities, it is commercially insolvent and may be wound up.

[3] The respondent has no *locus standi* to apply for a stay as under s. 243(1) of the Act only the liquidator, any creditor or contributory may apply to the Court for a stay of the winding-up. Since the law enables the liquidator to apply for a stay, it would not be proper for the Court to invoke its inherent jurisdiction under O. 92 r. 4 of the RHC 1980 to stay the winding-up. Furthermore, in practice once a winding-up order is made, a stay is never granted because it interferes with the liquidator's duty and power.

[Order in terms of the petition; respondent's application for a stay refused.]

Cases referred to:

Tay Bok Choon v. Tahansan Sdn. Bhd. [1987] CLJ (Rep) 24 ***(foll)***
Lee Ah Tee v. Ong Tiow Pheng & 7 Ors. [1984] 1 CLJ (Rep) 187 ***(cit)***
DFC of T. v. Players Entertainment Network Pty. Ltd. & Anor. [1988] 6 ACL 902 ***(foll)***
Kampat Timber Industries Sdn. Bhd. v. Bensa Sdn. Bhd. [1990] 2 CLJ (Rep) 189 ***(foll)***
Metropolitan Waste Disposal Authority v. Willoughby Waste Disposal Authority Pty. Ltd. [1987] 9 NSW LR 7 ***(foll)***
Re African Farms Ltd. [1906] 1 Ch 640 ***(foll)***
Malayan Plant Pte. Ltd. v. Moscow Narodny Bank Ltd. [1980] 2 MLJ 53 ***(foll)***
Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors. [1988] 1 CLJ (Rep) 244 ***(cit)***
Re A & BC Chewing Gum Ltd. Topps Chewing Gum Inc. v. Coakley & Ors. [1975] 1 All ER 1017 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 2, 218(2)(a), 221(2)(c), 243(1)
Companies (Winding-up) Rules 1972, r. 26
Rules of the High Court 1980, O. 59 r. 31(4), O. 92 r. 4

For the petitioner - Low Siew Cheang, (Ranjit Singh & Aggie Chew with him); M/s. Cheang & Ariff
For the respondents - M.S. Murthi, (M. Poobalan with him); M/s. Murthi & Partners

JUDGMENT

Zakaria Yatim J:

In this petition, MBf Finance Bhd., the petitioner, was seeking the order of the Court that Sri-Hartamas Dvpt. Sdn. Bhd. (hereinafter referred to as "the company") be wound up on the ground that it was insolvent and unable to pay its debt.

The company was incorporated on 23 October 1976 under the Companies Act 1965, having its registered office on the third floor, Wisma Low Kim Her, 225-227, Jalan Tun Sambanthan, Kuala Lumpur.

On 12 July 1988 the petitioner obtained a final judgment against the company in Kuala Lumpur High Court Civil Suit No. D4-23-2067-87. According to the judgment it was adjudged that the plaintiff recover against the company the sum of RM5,197,060.82 together with interest thereon and costs. In the petition it was stated that the company was indebted to the petitioner in the sum of RM5,197,060.82 being the amount due on the final judgment together with interest at the rate of 17% per annum calculated from 1 December 1986 until the date of realisation and costs. On 27 December 1988, the petitioner, pursuant to s. 218 of the Companies Act delivered a statutory notice of demand, dated 24 December 1988 to the company at its registered address. According to the petition, more than twenty one days had lapsed since the notice of demand had been served on the company, but the company had failed, refused and/or neglected to pay the sum demanded or any part thereof to the petitioner.

There were twenty seven other creditors who had served notice of their intention to attend the hearing of the petition. All these twenty seven creditors supported the petition.

At the commencement of the hearing of the petition, Mr. M.S. Murthi, Counsel for the company sought the leave of the Court to adduce oral evidence. He submitted that the petition was founded on the presumption of insolvency. He then referred to paras. 3, 4, 5 and 6 of the affidavit of Lee Kim Wai, affirmed on behalf of the company on 29 June 1989. The paragraphs state:

> 3. I am advised by the respondent's solicitors and I verily believe that the notice is not in strict compliance with provisions in s. 218(2)(a) of the Companies Act 1965 (hereinafter referred to as "the Act") as the petitioner has failed to stipulate the exact amount due to the petitioner as at the date of the notice.
>
> 4. In the premise I am advised by the respondent's solicitors and I verily believe that the statutory presumption under the Act that the respondent is unable to pay its debt has not arisen and the petitioner has failed to adduce any evidence of same.
>
> 5. Further to the above the respondent is a housing developer and is the registered owner of all that pieces of lands more particularly described in the Schedule annexed hereto as Exh. "LKW1."
>
> 6. The wealth of the respondent's assets is "locked up" in the said land and owing to the recent depressed economic circumstances and acute recession, the respondent has been unable to complete its housing projects on the lands and has stopped all construction works on same.

According to Mr. Murthi, the company wanted to adduce evidence at the hearing of the petition in order to show what were the assets available, and how easily the assets could be realised. He contended that it was not equitable for the company to be wound up. He said that "how quickly (the assets) can be realised is a matter for expert evidence ..." He further said, "I want to get an expert on how the assets to be realised quickly." He submitted that the Court had jurisdiction to hear oral evidence at the hearing of a winding-up petition.

Mr. Loh Siew Cheang, Counsel the petitioner, said that he did not deny that the Court has jurisdiction to hear oral evidence. He submitted that the Court should not, however make a vain order. He said that the notice of demand served on the company was based on unsatisfied judgment. He contended that there were undisputed facts in this case as there was already a judgment obtained against the company. According to him the test of insolvency was inability to pay its debt.

Mr. Murthi then replied:

> We are not insolvent.

After hearing the submission of both the Counsel for the company and for the petitioner, I made a ruling refusing the application to adduce oral evidence.

It was not in dispute that the Court has jurisdiction to order that oral evidence be adduced at the hearing of a winding up petition. Section 221(2)(c), clearly states that the Court may "direct that oral evidence be taken on the petition or any matter relating thereto." Mr. Murthi was entitled to ask the Court to direct that oral evidence be adduced. I had examined the affidavits filed in this case and I was satisfied that there were no disputed facts. In *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] CLJ (Rep) 24, the Privy Council said:

> At the end of the day the Judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavit, than in the absence of oral evidence or cross-examination, the

> Judge must ignore the disputed allegations. The Judge must then decide the fate of the petition by consideration of the undisputed facts ... the board is satisfied that the Judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company ...

Mr. Murthi wanted to adduce evidence to show how the company's assets could be realised quickly. But Mr. Lee Kim Wai, in para. 6 of his affidavit quoted earlier had clearly stated that the company's assets were "locked up" in lands. This point was not in dispute. Indeed, Mr. Loh Siew Cheang was right in saying that the facts were not in dispute in this case. In the circumstances I was satisfied that the petition could be decided on affidavit evidence and I refused Mr. Murthi's application to adduce oral evidence.

After the ruling was made, the hearing was adjourned to a date to be fixed by the Senior Assistant Registrar.

At the continued hearing of the petition on 29 March 1991, Mr. Murthi raised a number of issues.

The first point he raised was that the statutory presumption under s. 218(2)(a) of the Companies Act did not arise in the present case. He said that according to the petition, the notice of demand was served on the company on 27 December 1988 and the petition itself was dated 17 January 1989. He also said that the petition was presented on the 21st day not three weeks after the service of the notice of demand. According to him, in order to comply with the requirements of s. 218(2)(a) the petition must be presented on the 22nd day after service of the notice of demand. The petitioner, in its affidavit affirmed on 12 June 1991 averred that the petition was filed on 19 January 1989. A copy of the *praecipe* exhibited to the affidavit confirmed the date. In the light of this evidence Mr. Murthi subsequently conceded that the 21 days requirement had been met and he therefore abandoned the point.

The second ground he relied upon was that the notice of demand was not issued by the lawfully authorised agent of the petitioner because it was issued by M/s. Cheang & Ariff, a firm of advocates and solicitors.

The third point raised by Mr. Murthi was the test of solvency.

As it was already 4.30 p.m., the Court adjourned the hearing to another date.

When the matter came up for continued hearing on 18 July 1991, all Counsel were present except Mr. Murthi. In his place was Mr. Poobalan, who was mentioning on behalf of Counsel for the company. Mr. Poobalan told the Court that on 20 June 1991, Counsel for the company had written a letter to this Court requesting that this matter be postponed as Counsel had a part-heard matter in the Sessions Court, Shah Alam. Mr. Poobalan then asked the Court to adjourn the hearing of the petition to another date. Mr. Loh Siew Cheang objected to a postponement of this matter. He also said that all the supporting creditors did not agree to an adjournment. After hearing both Mr. Poobalan and Mr. Loh Siew Cheang, I refused to adjournment. See *Lee Ah Tee v. Ong Tiow Pheng & 7 Ors.* [1984] 1 CLJ (Rep) 187. In the circumstances of the present case, it would not be proper for the Court to grant the adjournment. Firstly, when the date of the continued hearing was fixed, it was fixed for the convenience of all parties. Secondly, Mr. Murthi agreed to the date even though he was aware that he had a matter in Shah Alam fixed on the same day. According to Mr. Poobalan when Mr. Murthi said that the date was suitable to him he did not know that the Shah Alam case was a priority case. With respect, the hearing before this Court should take priority over the Shah Alam matter. Thirdly, Mr. Poobalan said that Mr. Murthi had made a mistake about the date. In their letter to the Senior Assistant Registrar dated 20 June 1991, M/s. Murthi and partners, *inter alia*, wrote:

Harap dimaklumkan bahawa secara tidak sengaja peguam kami telah terlupa bahawa beliau juga akan mengendalikan satu lagi kes di Mahkamah Sesyen Shah Alam(D1-22-143-87/MS/SA 133/00) yang telah ditetapkan khas oleh Tuan Hakim Tuan Tee Ah Seng sendiri untuk sambungan perbicaraan untuk didengar di Mahkamah Sesyen Shah Alam pada 16 Julai 1991 dan 18 Julai 1991.

In my view a mistake of a solicitor cannot be considered a valid ground for adjournment.

After the application for adjournment was refused Mr. Loh Siew Cheang proceeded to submit the case for the petitioner.

It was After Mr. Loh Siew Cheang had finished his submission when Mr. Murthi walked into the Court room. He tendered his apologies and proceeded to make his submission.

In his submission, he raised further issues. He referred to the affidavit of Mr. Song Soon Ong, the senior manager of the petitioner, affirmed on 12 June 1991. In para. 2 of that affidavit, the deponent said that he was the officer directly entrusted by the petitioner to issue instructions and to authorise solicitors to issue notice of demand to the company. Mr. Murthi next referred to Article 120 of the articles of association of the petitioner and said that "any persons", that is, more than one person could be appointed the attorney of the petitioner. He then referred to the power of attorney, which was exhibited to the affidavit of Mr. Ranjit Singh affirmed on 15 July 1991, and said that the power of attorney was invalid and if the power of attorney was invalid, the person named therein had no power to instruct solicitors and the solicitors had no authority to present the petition.

Mr. Murthi further submitted that even is if Mr. Song Soon Ong had the power, his authority was limited to RM750,000 only. The present case, he said, involved a sum of more than RM5 million.

Mr. Murthi next referred to the affidavit verifying the petition and submitted that Mr. Song Soon Ong, the Senior Manager could not swear the affidavit. According to him if the person had no authority to swear the affidavit verifying the petition, then the whole petition collapsed.

The next point raised by Mr. Murthi was that the petitioner had demanded more in the notice of demand than the actual sum due to the petitioner. Therefore, he contended that the notice was bad.

After hearing Mr. Murthi's submission on the issued raised by him and after hearing Mr. Loh Siew Cheang's submission I ruled that the notice of demand was in compliance with the requirement of s. 218(2)(a); and that the affidavit verifying the petition was sworn by the proper officer of the petitioner. I concluded my ruling by saying:

... in the circumstances the respondent is deemed to be unable to pay (its) debt.

I shall now deal with all the issues raised by Mr. Murthi except on the question of the 21 days notice, which Mr. Murthi had conceded was right.

I shall first deal with the question whether the notice of demand was issued in accordance with s. 218(2)(a) of the Companies Act. The notice of demand is reproduced below:

Statutory Demand Pursuant to S. 218 of the Companies Act 1965 (Act 125) for payment of a debt.

To: Sri-Hartamas Dvpt. Sdn. Bhd.
3rd Floor,
Wisma Low Kim Her
225-227, Jalan Tun Sambanthan
50470 Kuala Lumpur.

Take Notice that, We Messrs Cheang & Ariff of 18th Floor, Plaza MBf, Jalan Ampang, 50450 Kuala Lumpur, solicitors for MBf Finance Bhd. hereby require you to pay to us the principal sum due on a final judgment dated 12 July 1988 obtained by MBf Finance Bhd. against you in the High Court at Kuala Lumpur in Civil Suit No. D4-23-2067-87 that is to say the sum of RM5,197,060.82 together with interest thereon at the rate of 17% per annum from 1 February 1986 until the date of realisation and cost at RM400 whereon execution has not stayed or you must secure or compound for the aforesaid sum to the satisfaction of the said MBF Finance Bhd. within 21 days of the date hereof and that the consequences of not complying with the requisition of this notice are that winding-up proceedings may be taken against you.

Dated this 24 December 1988.

Sgd/-
M/s Cheang & Ariff
Solicitors for Mbf Finance Bhd.

It will be noted that the notice of demand was issued by M/s. Cheang & Ariff, solicitors for MBf Finance Bhd. Mr. Murthi contended that the solicitors were not the lawfully authorised agents of the petitioner to issue the notice. Mr. Loh Siew Cheang submitted that there was no necessity to search out and establish the authority of a solicitor who was generally retained by a client as solicitor in respect of his legal affairs and the solicitor had at all material times acted and continued to act on the same cause. In support of his submission, he referred to Ranjit Singh's affidavit where in para. 3, the deponent averred,

> At all material times, my firm M/s. Cheang & Ariff, have been on the panel of the petitioner and receive a monthly fee by way of retainer

Mr. Song Soon Ong, in his affidavit referred to earlier, stated in para. 2 of the affidavit that he was:

> ... entrusted with powers of supervision of legal proceedings in respect of the respondent's account including powers to appoint solicitors, issue instructions to and authorise solicitors so appointed to issue demands to the respondent ...

He also said that the notice of demand dated 24 December 1988:

> issued by the petitioner's solicitors with and under the authority of the petitioner...

Looking at the judgment annexed to the petition, it is evident that M/s. Cheang & Ariff were the solicitors in the Civil Suit pursuaint to which the judgment was obtained. The notice of demand was made pursuant to the judgment. The notice of demand was copied to the petitioner.

In my opinion Messrs. & Ariff were the lawfully authorised agents of the petitioner to issue the notice of demand. The crucial words in s. 218(2)(a) are "under the hand of his agent thereto lawfully authorised ..." In *DFC of T v. Players Entertainment Network Pty. Ltd. & Anor.* [1988] 6 ACLC 902, Gobbo J, in his judgment at p. 904 said:

> The New South Wales case that has been relied upon as supporting an argument for proof of authority of signature of a notice of demand is *Collions Bros Stationers Pty. Ltd.* [1986] 4 ACLC 234. In that case a dictum appeared in the judgment to the effect that because of a clerical error, there was no evidence of authority given to the solicitor to sign a notice on behalf of one of the plaintiffs under s. 364.
>
> In the first place, that decision, because of a quite significant difference in the rules, is not in my view applicable here. But I ought to go on to add, with respect, that I do not agree with the view that where the notice of demand is signed by a solicitor that necessarily then

calls for express evidence of authority of the solicitor to sign the notice on behalf of the creditor. *It would seem to me that the document, where it is signed by a person describing himself as the solicitor of the creditor, carries with it an assertance of agency. It would not seem necessary to have explicit evidence of authority which is, as it were, claimed and prima facie made out on the face of the document.*
(Emphasis Added)

Both Ormiston and Murphy JJ concurred with Gobbo J in *Kampat Timber Industries Sdn. Bhd. v. Bensa Sdn. Bhd.* [1990] 2 CLJ (Rep) 189, Abu Mansor bin Ali J, at p. 191 said:

A demand must be in writing signed by an authorised agent. Evidence, he submitted, is therefore required of the authority given to the solicitor to sign the statutory Notice. He asked did solicitor of petitioner have authority to sign Annexure 2 Exh. A?

I find this first point raised by the respondent to have no merit. I find the evidence is all there for us to see. In the first place the statutory notice is copied to petitioner's client clearly showing the notice was sent with client's instruction. When the petition was duly filed, it was signed by the sales executive of the petitioner's company. I find there is sufficient evidence that issue of the statutory notice was authorised ...

In *Metropolitian Waste Disposal Authority v. Willoughby Waste Disposals Pty. Ltd.* [1987] 9 NSWLR7, Cohen J in this judgment at p. 10 said.

In my opinion the letter signed by the director and addressed to the Crown Solicitor was sufficient authority not only to commence proceedings in the Court but to take steps necessary to wind up the company. One step which would be regarded as necessary in many circumstances, and in particular in the present case, would be the service of a notice of demand under s. 364. **The giving of the authority to proceed to institute proceedings for the liquidation of the company therefore, in my view, included the authority to sign a demand on behalf of the creditor**.
(Emphasis added)

I respectfully agree with the passages quoted above.

Mr. Murthi challenged the authority of Mr. Song Soon Ong to instruct Messrs. Cheang & Ariff to issue the notice of demand. He also challenged the right to Mr. Song Soon Ong to affirm the affidavit verifying the petition.

In order to determine this point it is necessary to examine the power of attorney exhibited to Mr. Ranjit Singh's affidavit affirmed on 15 July 1991. The Power of attorney which was created by the petitioner states:

Whereas ...

(2) Song Soon Ong (hereinafter called "the officer") is employed by the corporation as Senior Manager of the Credit Department of the Head Office of the corporation ...

Now this deed witnesseth

that the corporation hereby appoints the officer to be the true and lawful attorney and agent of the corporation to act for the corporation in the name of the corporation or in his own name to do perform and execute all or any of the following acts things and deeds relating to credit up to the limit of Malaysian Ringgit Seven Hundred and Fifty Thousand (RM750,000) including leasing and hire purchase up to the authorised limit of Malaysian Ringgit **Three Hundred Thousand (RM300,000) or such other limit as may be authorised by the corporation in writing from time to time (hereinafter referred to as" the authorised limit") ...**
(Emphasis Added)

Mr. Murthi submitted that Mr. Song Soon Ong's authority was limited to RM750,000 and RM300,000 for leasing and hire purchase. He failed to mention that the corporation could authorise him in writing to deal with a higher amount such as a RM5 million claim under the power of attorney. Mr. Song Soon Ong was bound to strictly observe all instructions and no person, body politic or corporate company shall enquire into such instructions. This is clearly stated in para. 5 of the power of attorney. Para. 5 states:

> Generally to do or cause to be done for and on behalf of the corporation all acts and things whatsoever which are requisite or expedient to be done or caused to be done in order to give effect to the foregoing, provided as between the officer and the corporation the officer shall be bound strictly to observe all instructions issued to and all restrictions imposed on him by the corporation from time to time **but no person body politic or corporate company or firm dealing with the officer shall be bound or concerned to see or inquire into or be a affected by notice of any such instructions or restrictions.**
> (Emphasis added)

Whatever written instruction he received from the petitioner was an internal matter within the corporation.

In his affidavit affirmed on 12 June 1991, Mr. Song Soon Ong in para. 4 and 5 stated:

> 4. I crave leave to refer to the petition and to all affidavits filed by or and on behalf of the petitioner in relation thereto. I unconditionally state that the petition itself including all affidavits which have been made by the petitioner's solicitors herein for and on behalf of the petitioner have been issued or undertaken, or made with and under the petitioner's authority. The authority aforesaid include all antecedent steps and notices which have respectively been executed, taken and issued by the petitioner's solicitors herein.
>
> 5. In the circumstances posited above, I therefore unconditionally state and confirm that the notice issued to the respondent under the s. 218 of the Companies Act 1965, including the petition itself which is signed by the petitioner's solicitors herein for and on behalf of the petitioner are acts which have been duly undertaken with and under the authority of the petitioner. If otherwise, I would not have executed the affidavit verifying the petition herein or issued further instructions on the subject matter.

I accepted his averment that the notice of demand was issued by Messrs. Cheang & Ariff with the authority of the petitioner.

Mr.Murthi argued that the power of attorney was bad because under the articles of association of the petitioner, the petitioner must appoint more than one person. Article 120 states:

> The directors may at any time and from time to time by power of attorney under the seal of the company appoint any persons to be the attorney of the company for such purposes and with such powers, authorities and discretions ...
>
> Article 2 provides that "Words incorporating the singular number only shall include the plural number, and vice versa."

In my opinion the said power of attorney is a valid power of attorney and the appointment of Mr. Song Soon Ong as the petitioner's attorney was a valid appointment.

I shall next deal with the affidavit verifying the petition. The affidavit is reproduced below:

> Affidavit Verifying Petition
>
> I, Song Soon Ong (NRIC NO. 4957447) the Senior Manager of the petitioner of Plaza MBf, Jalan Ampang, 50450 Kuala Lumpur and of full age do hereby solemnly and sincerely affirm and say as follows:

1. I am duly authorised by the above named petitioner to affirm this affidavit for and on its behalf.

2. Such of the statements in the petitioner now produced and shown to me marked with "A" as relate to the acts and deeds of the said petitioner are true and such of the statement as related to the acts and deeds of any other person or persons I believe to be true.

Rule 26 of the Companies (Winding-up) Rules 1972, provides:

26. Every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or in case the petition is presented by a Corp. by some director, secretary or other principal officer thereof , and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be *prima facie* evidence of the statements in the petition.

In the affidavit, Mr. Song Soon Ong said that he was the Senior Manager. There is no evidence that he was a director or the secretary of the petitioner. The question is whether he was the principal officer of the petitioner. The word "Officer" is defined in s. 2 of the Companies Act as any director, secretary, or employee of the corporation. As an employee of the petitioner within the meaning of s. 2. In my opinion, as a senior manager, Mr. Song Soon Ong can be regarded as a principal officer of the petitioner as envisaged in r. 26. His responsibilities are clearly stated in his affidavit affirmed on 12 June 1991.

Assuming that I am wrong in holding that Mr. Song Soon Ong was the principal officer when he affirmed the affidavit the petition, it does not necessarily mean that the affidavit must be rejected or the petition must fail. In *Re African Farm Ltd.* [1906] 1 Ch. 640, Warrington J is his judgment at p. 642 said:

I have looked into the practice, and have ascertained that there have been many cases some of which are unreported, in which an affidavit other than that of the petitioner has been accepted. I have also spoken respecting the matter to Buckley J, to whom the company business has been assigned. He has pointed out to me, and I in turn now desire to point out, that r. 29 does not state what is to be the result of non-compliance with its provisions. The rule does not say that the petition is in that case to fail. The rule is merely directory as to the kind of affidavit to be accepted as evidence. That leaves it open to the Court, in a proper case, to accept an affidavit which in an ordinary case coming before the Court would be accepted as sufficient evidence. I have already said that in this case the affidavit in question is of more value than that of the petitioner, and therefore, on the principle I have mentioned, I accept that affidavit as a sufficient compliance with r. 29. I therefore overrule the preliminary objection.

The next point argued by Mr. Murthi was that the amount stated in the notice of demand was excessive and therefore the notice was bad.

The judgment obtained by the petitioner against the company was for the sum of RM5,197,060.82 together with interest thereon at the rate of 17% per annum from 1 December 1986 until the date of realisation and costs. In the notice of demand, the company was asked to pay the petitioner the judgment sum of RM5,197,060.82 together with interest plus cost of RM400. Mr. Murthi objected to the sum of RM400. He submitted that the petitioner has demanded more than what the petitioner was entitled to and accordingly he alleged that the notice was bad.

Mr. Loh Siew Cheang explained how the figure of RM400 was included in the notice of demand. He said that under judgment there were two component sum proper. The second component sum was cost. He said that the judgment did not say that the cost was to be

taxed. He argued that in the case of a summary judgment a successful applicant was entitled to a fixed cost and not cost to be taxed. He referred to O. 59 r. 31(4) of the Rules of the High Court 1980, which states:

> Notwithstanding para. 1, costs shall unless the Court otherwise orders be allowed in the causes which Appendix 2 to this order applies in accordance with the provisions of the Appendix.

Item 2 of Appendix 2 states:

(5) In the case of judgment under O. 14 where an affidavit of service of the summons is required - RM15

(6) In the case of judgment under O. 24, for each adjournment of the summons - RM15

According to Mr. Loh Siew Cheang, there were four adjournments set out in para. 4 of Mr. Song Soon Ong's affidavit affirmed on 12 June 1991. The para. states:

> I crave leave to refer to the notice dated 24 December 1988 issued by the petitioner's solicitors with and under the authority of the petitioner to the respondent. The notice in question demanded payment of the amount adjudged to be due to the petitioner pursuant to a judgment dated 12 July 1988 obtained by the petitioner under an O. 14 application dated 2 April 1988. The hearing of the said O. 14 application was adjourned four times:

Date	Reasons
6.1 3 May 1988	All cases before Encik Ahmad Zaidi adjourned to 4 May 1988 at 10.00 am.
6.2 4 May 1988	Adjourned by Court to a date to be fixed.
6.3 31 May 1988	Adjourned to 27 June 1988 at the defendant's solicitors' request.
6.4 27 June 1988	Senior Assistant Registrar was on leave Adjourned to 12 July 1988.
6.5 12 July 1988	

Under Part II of Appendix 2, costs allowed under para. 1(c) is RM350. The total costs allowed under the Rules was RM350 plus RM60 which is RM410. According to Mr. Loh Siew Cheang the petitioner had demanded RM10 less.

I have seen the judgment and it contains an order for costs. The petitioner was entitled to claim the RM400. In my opinion the amount demanded in the notice was not in excess of the amount due to the petitioner.

After considering all the issues raised by Mr. Murthi, I was satisfied that the notice of demand was properly issued and in strict compliance with s. 218(2)(a). I took note of para. 7 of the petition which stated that the company had failed to pay the sum demanded after 21 days had lapsed since the notice was served. I accordingly ruled that the company was deemed to be unable to pay its debt.

The onus was therefore on the company to show that it was able to pay its debt or that it was a solvent company. Mr. Murthi merely told the Court that:

> In these circumstances we are not insolvent.

With respect that was not sufficient to rebut the presumption.

In the circumstances I made an order in terms of the petition.

I have considered all the affidavit evidence before me and the submissions of Counsel, and I was satisfied that the company was insolvent. It was admitted by the company in its affidavit affirmed on 29 June 1989 that the wealth of the company's assets was "locked-up" in pieces of land. In para. 2 of its affidavit affirmed on 28 March 1991, the company averred as follows:

> The value of the company's landed assets as at 4 May 1987, is Malaysian Ringgit Five Hundred and Ninety Seven Million Five Hundred and Ninety Thousand (RM597,590,000) only.

What the company was saying that it had assets but all the assets were locked up in landed properties. In my opinion the company had failed to show that it was not insolvent. In *Malayan Plant (Pte.) Ltd. v. Mascow Norondy Bank Ltd*. [1980] 2 MLJ 53 (an appeal from the Singapore Court of Appeal), the Privy Council in its decision at p. 54 said:

> There was also cited to the Chief Justice a passage from *Buckley on the Companies Act*, 13th Edn., at p. 460, dealing with "commercial insolvency, that is, of the company being unable to meet current demands upon it' and containing the following observations, which are, in the opinion of the board, impeccable.
>
> In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound; this is not the test. A company may be at the same insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially solvent and may be wound up.

For the reasons stated above I ordered that the company be wound-up on the ground that it was insolvent and unable to pay its debt.

After I made the order, Mr. Murthi stood up and applied for a stay.

Mr. Murthi submitted that he was asking for a stay under the inherent jurisdiction of the Court. He said he had instruction from his clients to appeal and pending appeal he wished to maintain the *status-quo*. He said that there were special circumstances and the *stats-quo* must be maintained. Mr. Low Siew Cheang objected to the application for stay. He referred to s. 243 of the companies Act and said that the person who could apply for a stay was the liquidator, the creditor or contributory. He said that the person who was entitled to make an application for stay, once a winding-up order was made, was the official receiver.

I refused to allow Mr. Murthi's application for a stay for the following reasons. Firstly Mr. Murthi had no *locus standi* to make the application under s. 243(1) of the Companies Act, only the liquidator or any creditor or contributory may apply for a stay. Section 243(1) states:

> 243.(1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

Secondly Mr. Murthi said that he was asking the Court to exercise its power under its inherent jurisdiction. Under O. 92 r. 4 of the Rules of the High Court, the Court has the inherent power to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. In *Permodalan MBf Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah Bin Abu Samad & Ors.* [1988] 1 CLJ (Rep) 244, the Supreme Court at p. 247 said:

> We read this to mean that the Rules cannot interefere with the exercise of the inherent powers by the Court so long as it deems fit necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient

> remedies, the Court will not invoke its inherent power. The most obvious remedy available in this case was the application to set aside the interim injunction which ought to have been heard early in lieu of the application to suspend the injunction. That is because an *ex parte* injunction is usually required immediately and such application will not be granted unless it is made by the plaintiff promptly. In normal practice, an early date is fixed for the inter-party hearing for the purpose of injunction until the trial of the action.

In the present case, since the liquidator can apply for a stay under s. 243(1), it would not be proper for this Court to invoke its inherent jurisdiction.

Thirdly, in practice once a winding-up order is made, a stay is never granted because it interferes with the liquidator's duty and power. In *Re A & BC Chewing Gum Ltd. Topps Chewing Gum Inc. v. Coakley & Ors.* [1975] 1 All ER 1017 Plowman J in this judgment at p. 1029 said:

> ... and as a matter of practice a stay is never granted. But there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding-up order has been made the Official Receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of s. 227 of the 1948 Act; and thirdly, the liabilities of the company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.

For the reasons I have just stated, I think I was justified in refusing Mr. Murthi's application for a stay.

Also found at [1992] 1 CLJ 160